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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kustom Pak Foods, Ltd.

Serial No. 76/232,799

Denise C. Mazour of Thomte, Mazour & Niebergall for Kustom Pak Foods, Ltd.

Ysa de Jesus, Trademark Examining Attorney, Law Office 101 (Angela Wilson, Acting Managing Attorney).

Before Seeherman, Hohein and Chapman, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Kustom Pak Foods, Ltd. has filed an application to register the mark "E-Z GRILL" and design, as shown below,

for "pork, beef, chicken and turkey for use in sandwiches."[1]

[1] Ser. No. 76/232,799, filed on March 27, 2001, which alleges a date of first use anywhere and in commerce of February 14, 2001. The word "GRILL" is disclaimed.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark "EASY GRILL," which is registered, as reproduced below,

for "frozen fish,"[2] as to be likely to cause confusion, or mistake or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity of the goods and the similarity of the marks.[3]

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[2] Reg. No. 1,632,014, issued on January 15, 1991, which sets forth a date of first use anywhere and in commerce of January 11, 1990; renewed.

[3] The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

Turning first to consideration of the respective marks, applicant maintains that its mark, which consists of "a flame and clock design, as well as the words 'E-Z GRILL,'" differs in appearance from registrant's mark, which consists of "the words 'Easy Grill' in a stylized form." Applicant also asserts that the respective marks differ in connotation and commercial impression inasmuch as its mark suggests "a product which is quickly and easily grilled," while registrant's mark only suggests "a product which is easily grilled." Applicant contends, in view thereof, that the "dissimilarities between the two marks are so great as to create completely different overall impressions, thus leading to the conclusion that confusion is not likely."

Although the above differences, and a few other minor ones as well, are apparent on the basis of a side-by-side comparison of the respective marks, the Examining Attorney correctly notes in her brief that the proper test for determining likelihood of confusion is not whether the marks at issue are distinguishable on such a basis, but whether they create basically the same overall commercial impression. The reason therefor is that a side-by-side comparison is ordinarily not the way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is thus on the recollection of the average

purchaser, who normally retains only a general rather than a specific impression of marks. See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); Envirotech Corp. v. Solaron Corp., 211 USPQ 724, 733 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

With the foregoing in mind, we agree with the Examining Attorney that, when considered in their entireties, the marks "E-Z GRILL" and design and "EASY GRILL" and design are so substantially similar that, if used in connection with the same or closely related goods, confusion as to source or sponsorship would be likely to occur. Applicant's and registrant's marks, as the Examining Attorney accurately points out in her brief, are identical in sound and connotation because their literal portions are phonetic equivalents. In terms of appearance, applicant's mark contains what it characterizes as a clock and flame design, although such design, to us, could also reasonably be regarded as a grill and flame design. Although the design element in applicant's mark is absent from registrant's mark, we concur with the Examining Attorney that such element "does not obviate the likelihood of confusion." In particular, while such element, depending on how it is viewed, may serve either to suggest a reason why applicant's goods are easy to grill, namely, that they cook quickly over an open flame, or to reinforce the fact that applicant's goods are intended to be grilled, the overall commercial impression engendered by applicant's mark is the same

as that projected by registrant's mark, namely, food products that are easily grilled or easy to grill.

Turning, then, to consideration of the respective goods, applicant argues that its pork, beef, chicken and turkey for use in sandwiches are products which "are entirely unrelated to the goods provided by the registrant, namely, frozen fish." While conceding that, "obviously[,] frozen fish and pork, beef, chicken and turkey for use in sandwiches are all food items," applicant insists that "it cannot be said that the goods are so related as to cause a likelihood of confusion." Applicant, in particular, asserts in this regard that:

> Frozen fish typically is sold in the frozen food section of grocery stores. Applicant's goods are not sold from the frozen food section of grocery stores. Typically, applicant's goods are sold to restaurants, hotels and institutions for their use in preparing grilled sandwiches. The channels of trade, therefore, are so dissimilar as to avoid a likelihood of confusion.

We concur with the Examining Attorney, however, that as identified in applicant's application and the cited registration, the goods at issue are so closely related that, when marketed under the substantially similar marks "E-Z GRILL" and design and "EASY GRILL" and design, confusion as to their source or sponsorship is likely to occur. It is well settled, as the Examining Attorney notes in her brief, that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration, and not in light of what such goods are asserted to actually be. See, e.g., Octocom Systems Inc. v.

Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, as is the case herein, where an applicant's and a registrant's goods are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registration encompass not only all goods of the nature and type described therein, but that the identified goods move in all channels of trade which would be normal for those goods and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

As the Examining Attorney, in light of the above, accurately observes, registrant's goods are broadly identified as "frozen fish" and, in view thereof, such goods include fish for use in sandwiches. Similarly, she points out that because applicant's goods are broadly set forth as "pork, beef, chicken and turkey for use in sandwiches," such goods are not limited to meat products which are principally sold to hotels, restaurants and/or institutions. Thus, as she further correctly notes, "[t]he same consumers will be exposed to the goods identified with both marks." Ordinary consumers, for instance, can therefore be expected to encounter applicant's meats for sandwiches in the same grocery stores, supermarkets, mass

merchant discount outlets and other food retailers as those which market registrant's frozen fish.

Moreover, the Examining Attorney properly points out that it is well established that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient, instead, that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). Here, the record contains evidence showing that applicant's goods are closely related to registrant's goods in a commercial sense, such that purchasers thereof would be likely to attribute a common origin to the respective goods when sold under the marks at issue.

Specifically, the Examining Attorney has made of record copies of over 30 use-based third-party registrations for marks which are registered for, *inter alia*, "frozen poultry," "frozen meat," "frozen pork," "frozen beef," "frozen chicken," "frozen prepared chicken," "frozen and packaged meat" or "processed meats," on the one hand, and "frozen fish," "frozen seafood," "frozen prepared seafood" or "frozen and packaged ... fish," on the other. While such registrations are admittedly not evidence

that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988). In addition, as the Examining Attorney accurately observes, the specimens of use with respect to applicant's goods bear the instruction "KEEP FROZEN," thereby indicating that, like registrant's frozen fish, applicant's pork, beef, chicken and turkey for use in sandwiches are sold as frozen goods. In view thereof it is plain that both applicant's and registrant's products would be sold in the frozen food sections of retail food outlets and would be sold in frozen form to commercial customers, such as restaurants, hotels and institutions, for use in preparing grilled sandwiches.

Accordingly, we conclude that customers who are familiar or acquainted with registrant's mark "EASY GRILL" and design for its "frozen fish" would be likely to believe, upon encountering applicant's substantially similar mark "E-Z GRILL" and design for its "pork, beef, chicken and turkey for use in sandwiches," that such closely related goods emanate from, or are sponsored by or associated with, the same source.

Decision: The refusal under Section 2(d) is affirmed.